

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 9, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP383**

**Cir. Ct. No. 2014CV1084**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**MIDLAND FUNDING LLC,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WALTER J. WITTEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County:  
RHONDA L. LANFORD, Judge. *Affirmed.*

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. Walter Witten, pro se, appeals from a judgment entered against him for unpaid credit card debt. We affirm.

## BACKGROUND<sup>1</sup>

¶2 According to its complaint, Midland Funding LLC purchased credit card debt from Citibank allegedly owed by Witten. Midland sued Witten for breach of contract, account stated, and implied contract/unjust enrichment. Midland alleged that Witten and the original creditor of Witten’s account, Citibank South Dakota NA/The Home Depot, had entered into a credit agreement under which Witten had purchased “various goods, services, merchandise and/or money on credit.” Midland alleged that it “is in the business of purchasing debt, and is the successor in interest” to Citibank’s creditor rights against Witten. Midland alleged that Witten defaulted under the terms of the credit card agreement, that Witten failed to make payments for the amount due, and that Witten owed Midland \$14,065.27 as of April 2, 2014. Witten answered, entering a general denial to Midland’s claims, and asserted numerous affirmative defenses. The court set a briefing schedule during a scheduling conference.

¶3 Midland moved for summary judgment and in support submitted affidavits of Daniel J. Fisher, an employee of Citibank, and Mary Pikkaraine, an employee of Midland. Citibank account statements, a credit card application, a bill of sale, and an asset schedule were submitted under Fisher’s affidavit. A Notice of New Ownership and Pre-Legal Review informing Witten that Midland had purchased his debt and a Midland account statement were submitted under Pikkaraine’s affidavit.

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<sup>1</sup> We note that Midland’s brief does not include citations to the record in its “Statement of Facts” or “Argument” sections, which is a basic requirement. *See* WIS. STAT. RULE 809.19(1)(d), (e). We remind counsel that this places an unfair burden on opposing counsel and the court, and unnecessarily risks confusion.

¶4 The parties deviated from the briefing schedule, although neither party filed a motion to strike the other's submissions, and the circuit court apparently considered all of the papers filed by the parties. Rather than filing a brief responding to Midland's motion for summary judgment, Witten filed a motion to dismiss. Midland then filed what it called "Plaintiff's Reply in Opposition to Defendant's Motion to Dismiss and in Support of Plaintiff's Motion for Summary Judgment." Finally, Witten filed a brief that responded for the first time to Midland's motion for summary judgment and served as his reply brief on the motion to dismiss.

¶5 At a motion hearing on January 22, 2015, the circuit court denied Witten's motion to dismiss. Then, noting that Midland supported its motion for summary judgment with affidavits and documentation and that Witten did not respond to Midland's summary judgment motion with an affidavit or other documentation presenting an issue of fact, the circuit court granted summary judgment in favor of Midland. Judgment for \$14,880.77, which includes statutory attorney fees and costs, was entered against Witten on February 10, 2015. Witten appeals.

#### STANDARD OF REVIEW

¶6 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. *State v. Bobby G.*, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. WIS. STAT.

§ 802.08(2) (2015-16);<sup>2</sup> *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. We examine the moving papers and documents supporting the motion to determine whether the moving party has established a prima facie case. *Kraemer Bros., Inc. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 566, 278 N.W.2d 857 (1979). If those submissions make a prima facie case for summary judgment, we examine the opposing party's submissions to determine if they set forth facts demonstrating a genuine issue for trial. *Id.* at 567.

## DISCUSSION

¶7 Before beginning our substantive analysis, we pause to clarify a few procedural issues. First, on appeal, Witten makes arguments related only to the summary judgment order, so that is the only ruling we consider. Second, we emphasize that Witten did not offer an affidavit or other evidence in response to Midland's summary judgment motion, as pointed out by the circuit court and Midland. In other words, Witten has not attempted to set forth facts demonstrating a genuine issue for trial, thus our analysis is limited to deciding whether Midland established a prima facie case for summary judgment. We turn to that discussion now.

¶8 An affidavit supporting a motion for summary judgment must be made on personal knowledge and set forth facts that would be admissible at trial. WIS. STAT. § 802.08(3); *Palisades*, 324 Wis. 2d 180, ¶10. The affidavit must

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

establish a prima facie case for admissibility of any evidence submitted under the affidavit. *Palisades*, 324 Wis. 2d 180, ¶10.

¶9 As stated earlier, Midland supports its motion for summary judgment with two affidavits and the documents submitted under those affidavits. The issue is whether these documents are admissible under the hearsay exception for records of regularly conducted activity under WIS. STAT. § 908.03(6) (hereinafter “business records exception”). A prima facie case of admissibility can be established by an affiant who is “*qualified* to testify that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity.” *Palisades*, 324 Wis. 2d 180, ¶20; § 908.03(6).

¶10 With those legal requirements established, we turn to the affidavits submitted by Midland to determine whether Midland has established a prima facie case that this evidence would be admissible at trial. The first affiant is Daniel Fisher, who averred that he is an employee of Citibank and is authorized to make the affidavit “based on either personal knowledge or review of the business records of Citibank.” Fisher averred further:

My duties include having knowledge of, and access to, business records relating to [Witten’s alleged] Citibank account .... These records are kept by Citibank in the regular course of business and it was in the regular course of business of Citibank for an employee or representative with personal knowledge of the act, event, condition, or opinion recorded to make memorandum or records or to transmit information thereof to be included in such memorandum or records; and that the records were made at or near the time of the act and/or event recorded or reasonably soon thereafter.

¶11 Fisher’s averments, when read together, are sufficient to establish that Fisher is qualified to testify to the admissibility of Witten’s Citibank account statements, credit card application, bill of sale and asset schedule, pursuant to WIS. STAT. § 908.03(6). We acknowledge that Fisher’s affidavit does not explicitly refer to The Home Depot, but we conclude that it sufficiently establishes a prima facie case that Witten’s application was for an account that involved some variety of joint venture between Citibank and The Home Depot. And, Witten does not argue otherwise.

¶12 Fisher’s affidavit establishes that he has personal knowledge (1) of how Witten’s payment history and account statements were prepared or created, and (2) that these documents were prepared in the ordinary course of Citibank’s business. See *Palisades*, 324 Wis. 2d 180, ¶21. In *Palisades* terms, Fisher’s affidavit established that he has the requisite personal knowledge and is qualified to testify that (1) the records were “made at or near the time by, or from information transmitted by, a person with knowledge” and (2) that this was done “in the course of a regularly conducted activity.” *Id.*, ¶22; WIS. STAT. § 908.03(6). In *Neis*, we concluded that language similar to that used in Fisher’s affidavit satisfied the admissibility requirements of the business records exception. See *Bank of Am. v. Neis*, 2013 WI App 89, ¶¶31-32, 349 Wis. 2d 461, 835 N.W.2d 527 (stating that under *Palisades*, there must be a showing by a witness with personal knowledge of how documents were created). Thus, Midland has established a prima facie case for admissibility of the evidence submitted under Fisher’s affidavit.

¶13 We turn next to the second affiant, Mary Pikkaraine, who avers that she is a legal specialist for Midland. Pikkaraine avers that she has “personal

knowledge of those account records maintained on [Midland's] behalf" including the account alleged to be Witten's. Pikkaraine also avers:

I am familiar with and trained on the manner and method by which [Midland] creates and maintains its business records pertaining to [Witten's alleged] account. The records are kept in the regular course of business. It was in the regular course of business for a person with knowledge of the act or event recorded to make the record or data compilation, or ... transmit information thereof to be included in such record. In the regular course of business, the record or compilation is made at or near the time of the act or event.

Pikkaraine's affidavit establishes that she has the requisite personal knowledge and is qualified to testify that (1) the records were "made at or near the time by, or from information transmitted by, a person with knowledge" and (2) that this was done "in the course of a regularly conducted activity." *Palisades*, 324 Wis. 2d 180, ¶22; WIS. STAT. § 908.03(6). This establishes a prima facie case for admissibility of the evidence submitted under Pikkaraine's affidavit.

¶14 With the admissibility of Midland's evidence established under the business records exception, we turn now to determine whether the evidence submitted under the affidavits is sufficient to establish a prima facie case for summary judgment. Midland must establish that Witten owes a debt of \$14,065.27 and that Midland is an appropriate party to claim that debt.

¶15 The documents submitted under Fisher's affidavit establish that Witten signed up for the Citibank/The Home Depot credit card on October 30, 2006, and that on October 21, 2010, he owed \$14,065.27. Witten's account was then sold to Midland on October 24, 2011. The documents submitted under Pikkaraine's affidavit establish that Midland informed Witten about its purchase of

his debt, that Midland attempted unsuccessfully to collect the debt, and that Witten owes Midland \$14,065.27 as of May 16, 2014.

¶16 To repeat, we examine the non-moving party's submissions and arguments to determine if there are material facts in dispute that require a trial. *See Kraemer Bros.*, 89 Wis. 2d at 567. As we have explained, Witten did not submit to the circuit court any evidence that might establish the existence of material facts in dispute nor did he make an argument that showed he was entitled to a trial as a matter of law. On appeal, Witten presents conclusory and undeveloped arguments without any legal analysis based on applicable case law and therefore we need not consider them. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address inadequately developed arguments).

¶17 Accordingly, for the reasons explained above, we affirm the circuit court's judgment in favor of Midland Funding.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.



